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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 855

WARREN G. WILLIAMS,
Petitioner,

vs.

SEABOARD AIR LINE RAILROAD COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF OF RESPONDENT IN OPPOSITION

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ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF OF RESPONDENT IN OPPOSITION

PRELIMINARY

Petitioner, Warren G. Williams, who was Plaintiff in the Trial Court and Appellee-Respondent in the Florida Appellate Court, will be herein referred to as "Williams".

Respondent, Seaboard Air Line Railroad Company, who was Defendant in the Trial Court and Appellant-Petitioner in the Florida Appellate Courts, will be herein referred to as "the Railroad".

The Petition for Certiorari will be herein referred to as "the Petition".

The District Courts of Appeal of Florida (the intermediate appellate Courts), will be referred to as "the District Court".

The correct style of these proceedings, as stated above, should name only the Railroad, as sole Respondent, without the addition of "et al". The latter language was added in Williams' Petition for Certiorari. George Wilbur Eaddy, Engineer of the train involved, was originally a Co-Defendant in the Trial Court, but he was dismissed as such by Williams near the commencement of the trial. (pp. 3-5 of Volume 7 of the Record).

QUESTIONS PRESENTED

We respectfully submit that the questions now presented are as follows, rather than as stated by Williams. (Petition, pp. 2-3).

I.

Does this Court have the jurisdiction to review the judgment of the Florida Supreme Court herein, which was not final, but which remanded the cause to the Trial Court for a new trial?

II.

Should certiorari be granted herein where it appears that the judgment of the Florida Supreme Court was based upon adequate non-federal grounds?

III.

Do the facts in this case present questions of sufficient public importance to invoke the discretionary power of this Court to grant certiorari?

IV.

Were the Federal questions presented in the Petition properly and timely raised in the prior proceedings herein and, should the Petition be denied for failure to comply with Revised Rule 23-1(f) of this Court?

CONSTITUTIONAL PROVISIONS INVOLVED

In addition to the Federal constitutional provision cited by Williams (Petition, p. 3), the first sentence of Section 12, Declaration of Rights, Florida Constitution is likewise involved:

> "No person shall be subject to be twice put in jeopardy for the same offense, nor compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken without just compensation."

STATEMENT OF THE CASE

The Statement of the Case in the Petition (pp. 3-5) is accepted as substantially correct, with the following exceptions.

The statement (p. 5) as to arguments in Williams' brief in the Florida Supreme Court is not supported by the record in these proceedings, and is in effect testimony, manifestly improper at this stage of the case.

The judgment of the Florida Supreme Court not only reversed the District Court, but it also directed that *"the cause be remanded to the trial court for new trial"*. (Emphasis supplied). (Appendix A to the Petition).

Williams did not "again assert the violation of his federally protected rights" in his Petition for Rehearing

to the Florida Supreme Court, as stated in his Petition. (p. 5). In the first place he had not previously asserted them in the record, and could not have *again* asserted them. Further, it appears from said Petition for Rehearing (Appendix A to this Brief) that he only raised a narrow constitutional question as to whether the Railroad was required, from a constitutional standpoint, to seek review from an Interlocutory Order of the District Court denying extraordinary motions. This was obviously a non-federal question. (See Section 3 of the Petition for Rehearing, Appendix A to this Brief).

ARGUMENT

I.

Does This Court Have the Jurisdiction to Review the Judgment of the Florida Supreme Court Herein, Which Was Not Final, but Which Remanded the Cause to the Trial Court for a New Trial?

As demonstrated in the Statement of Facts herein, in the judgment of the Florida Supreme Court sought to be reviewed herein, the Court ordered "that the cause be remanded to the trial court for a new trial".

This fact alone would prevent Williams from invoking the review of that judgment.

It is clear from repeated decisions of this Court that under such action of a State Court, this Court does not have jurisdiction to grant a Petition for Certiorari.

The statutory jurisdiction of this Court to review actions of State Supreme Courts is declared in 28 *U.S.C.; Section 1257:*

> "*Final judgments* or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: * * *
>
> (3) By writ of certiorari * * * where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, * * * of the United States." (Emphasis supplied).

The effect of the remanding of a case for a new trial is stated in *Annot.*, 89 L. Ed. 1186:

> "A judgment * * * of the highest Court of a State reversing an inferior Court and remanding the case to the lower Court for a new trial * * * is not a final judgment and cannot be reviewed by the Federal Supreme Court."

Nearly a column of citations are given, starting with *Houston* v. *Moore*, 3 Wheat. 433 (1818).

In that early case, in opinion by Chief Justice Marshall, this Court held that it did not have jurisdiction to review a judgment of a State Court which ordered a new trial, because it was not a final judgment, saying:

> "The cause may yet be finally determined in favor of the Plaintiff in the State Court."

To the same effect is *Moore's Commentary on the U. S. Judicial Code*, 568:

> "A judgment of the highest State Court remanding a case for further proceedings, instead of dismissal, is not final even though it disposes of the federal issues."

From the numerous decisions of this Court applying this principle several comparatively recent ones are selected as illustrative.

In *Laclede Gas Light Company* v. *Public Service Commission,* 304 U.S. 398, 58 S. Ct. 988 (1938), the Supreme Court of Missouri had affirmed a judgment and remanded the cause to the Commission for further proceedings regarding determination of proper utility rates. This Court in dismissing the proceedings said:

> "As we are unable to conclude upon the record before us that the State Court has finally disposed of the controversy, the motion to dismiss the appeal must be granted."

In *Gospel Army* v. *City of Los Angeles,* 331 U.S. 543, 67 S. Ct. 1428 (1947), there was an unqualified reversal of lower Court proceedings by the California Supreme Court. Under the law of California, an unqualified reversal is effective to remand the cause "for a new trial and places the parties in the same position as if the case had never been tried."

This Court in dismissing the proceedings said:

> "Under Sec. 237 of the Judicial Code, 28 U.S.C., Sec. 344 (now Sec. 1257) only 'final judgments' of state courts may be appealed to this Court. And it frequently has been said that for a judgment of an appellate court to be final and reviewable for this purpose it must end the litigation by fully determining the rights of the parties, so that nothing remains to be done by the trial court 'except the ministerial act of entering the judgment which the appellate court * * * directed.' *Department of Banking, State of Nebraska* v. *Pink,* 317 U.S. 264, 63 S. Ct. 233, 235, 87 L. Ed. 254. Thus, where the effect of the state court's direction is to grant a new trial, the judgment will not be final."

In *Southern Pacific Company* v. *Gileo*, 351 U.S. 493, 76 S. Ct. 952 (1956), dismissed writs of certiorari on the ground that the effect of the lower Court's decision was to remand the case to the trial court, saying:

> "Since the issues of negligence and damages remain to be tried, there is no final judgment in the highest court of the State, and this Court, therefore, lacks jurisdiction to review the Eugrazia and Eelk cases. 28 U.S.C., Sec. 1257, 28 U.S.C.A., Sec. 1257. We therefore dismiss the writs in those two cases."

The requirements of this principle are clearly stated in *Market Street Railway Company* v. *Railroad Commission*, 324 U.S. 548, 65 S. Ct. 770 (1945).

> "Our jurisdiction to review a state court judgment is confined by long-standing statute to one which is final. Judicial Code, Sec. 237, 28 U.S.C., Sec. 344, 28 U.S.C.A. 344 (now Sec. 1257). Final it must be in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. *It must be the final word of a final court.*" (Emphasis supplied).

The reason for the application of this rule in the case at bar is obvious. Under the Florida Supreme Court judgment, the case goes back to the trial court, the Circuit Court of Palm Beach County, Florida for a new trial. At that trial a new jury may well find Williams free of contributory negligence, the Railroad guilty of negligence, and that Williams' damages are more than found by the first jury. Or, even if the Railroad prevailed at trial, the Florida Appellate Courts may well reverse that judgment. Or, there may be a settlement between the parties.

In the language of Chief Justice Marshall in *Houston* v. *Moore*, supra, "The cause may yet be finally determined in favor of the Plaintiff in the State Court".

It is apparent that the case at bar does not meet the test enunciated in the *Market Street* case, supra. It is not "the final word of a final Court".

Therefore, it is respectfully submitted that the pending Petition be denied for lack of finality of the judgment sought to be reviewed.

II.

Should Certiorari Be Granted Herein Where It Appears That the Judgment of the Florida Supreme Court Was Based upon Adequate Non-Federal Grounds?

It is axiomatic that this Court will not review the judgment of a State Court if it is based upon independent and adequate non-federal grounds.

This principle is concisely summarized in *Stern and Gressman, Supreme Court Practice*, 105:

> "The Supreme Court has consistently adhered to the self-imposed principle that it will not review a state court judgment based upon an adequate and independent non-federal ground, even though a federal question be involved and perhaps wrongly decided. *Murdock* v. *Memphis*, 20 Wall. 590, 636; *Berea College* v. *Kentucky*, 211 U.S. 45, 53; *Fox Film Corp.* v. *Muller*, 296 U.S. 207. 'The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and Federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to

> revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of Federal laws, our review could amount to nothing more than an advisory opinion.' *Herb* v. *Pitcairn,* 324 U.S. 117, 125-6."

This rule was reiterated by this Court as recently as *Henry* v. *Mississippi,* 379 U.S. 564, 85 S. Ct. 564 (1965), in which the Court said:

> "It is, of course, a familiar principle that this Court will decline to review state court judgments which rest on independent and adequate state grounds, even where these judgments also decide federal questions. The principle applies not only in cases involving state substantive grounds, *Murdock* v. *City of Memphis,* 20 Wall. 590, 22 L. Ed. 429, but also in cases involving state procedural grounds. * * * Under the view taken in Murdock of the statutes conferring appellate jurisdiction on this Court, we have no power to revise judgments on questions of state law. Thus, the adequate nonfederal ground doctrine is necessary to avoid advisory opinions."

Examination of the opinion and judgment in the Florida Supreme Court in the case at bar (Appendix A to Petition), demonstrates that the entire decision was not only based on non-federal grounds but that no federal grounds were referred to nor discussed by the Court.

The opinion first holds that the Florida Supreme Court has the power to examine the record to determine whether there is a conflict between the case involved and other decisions of the Court, even though the District Court ruled without opinion. This was obviously a non-federal point. Then the Court reversed the District Court and remanded the cause for a new trial on the authority of two recent opinions on the subject, *Florida East Coast*

Railway Company v. *Rouse*, 194 So. 2d 260 (1967) and *Atlantic Coast Line Railway Company* v. *Braz*, 196 So. 2d 109 (1961).

Referring to these cases, *Rouse* holds that there was a conflict between the judgment of the District Court and the Florida Supreme Court decision in *Georgia Southern & Florida Railway Company* v. *Seven-Up Bottling Company*, 175 So. 2d 39 (1965). (This will be hereinafter referred to, as Williams has in his Petition, as the "Seven-Up case".) This *Seven-Up* opinion appears in the Appendix to the Petition herein, B. The Court further held that, under the circumstances, the point as to conflict could be raised on appeal, although not raised on the trial level; that, accordingly, the judgment of the District Court would be reversed for a new trial. (See Appendix B to this Brief).

In *Braz* the decision was based upon the authority of *Rouse* and reversed the District Court, for a new trial.

Likewise, in ruling on Petition for Rehearing in the case at bar by Williams, the Florida Supreme Court discussed no federal point, but concisely ruled "that said petition be and the same is hereby denied". (See Appendix C to this Brief).

As for the *Seven-Up* case, it clearly rested upon a non-federal ground. Aside from holding that *Section 768.06, Florida Statutes*, the *Comparative Negligence Statute*, was invalid under the Federal Constitution, it *also* held it invalid under *Section 12 of the Declaration of Rights, Florida Constitution*, which has been quoted above under "Constitutional Provisions Involved".

So, even if the ruling as to the effect of the *United States Constitution* on the *Comparative Negligence Stat-*

ute is erroneous, there would still exist an adequate ruling on non-federal grounds—the construction of a provision in the Florida Constitution by the Florida Supreme Court, holding that the Statute violated the Florida Constitution.

Therefore, we submit that in addition to the other grounds in this Brief, the Petition should be dismissed because the judgment involved herein "rests upon independent and adequate state grounds" even though the *Seven-Up* case also decided a federal question.

III.

Do the Facts in This Case Present Questions of Sufficient Public Importance to Invoke the Discretionary Power of This Court to Grant Certiorari?

A consideration in the granting or denying of a certiorari petition by this Court is the importance of the issues involved.

As stated in *Stern and Gressman, Supreme Court Practice,* 136-7:

> "Except where an irreconcilable conflict compels review by the Supreme Court, the importance of the issues involved in the case as to which review is sought is of major significance in determining whether the writ of certiorari will issue. The Court does not have time to give full consideration to all cases which present novel or interesting issues. It must necessarily confine itself to those which reflect the more important legal problems within the realms of its jurisdiction." * * *
>
> "The concept of importance relates, of course, to the importance of the issues 'to the public as distinguished from' importance to the particular 'parties' involved. *Layne* v. *Bowler Corp.* v. *Western Well Works,* 261 U.S. 387, 393 (43 S. Ct. 422); *Rice*

v. *Sioux City Cemetery*, 349 U.S. 70, 79 (75 S. Ct. 614). Except where a governmental or public body is a litigant and is able to demonstrate an importance in terms of the public interest it represents, an issue the Court deems of interest and importance only to the immediate parties to the case is not likely to qualify as worthy of further consideration."

In the *Layne* case, supra, the Court said:

> "* * * (I)t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals. The present case certainly comes under neither head."

And in the *Rice* case, supra, a writ of certiorari which had been granted was dismissed by this Court as improvidently granted, on the authority of *Layne*, supra, the Court quoting the above language.

Applying this principle to the case at bar, it appears that the points involved, although important to the parties, are not important to the public generally.

The *Seven-Up* decision, attacked by Williams, affects only the small number of people in Florida who incur injuries by driving upon the railroad tracks when trains are coming, or who strike trains on the tracks. The statistics in the Appendix to the Petition D, although evidentiary, not a part of the record and improperly presented at this stage of the litigation, do demonstrate the very small number of persons affected by the *Comparative Negligence Statute*, in comparison with Florida's population in excess of six million residents, plus countless millions of visitors. These statistics show only an average

of 127 persons a year for six years involved in grade crossing accidents. From the national standpoint, the issue dwarfs into insignificance in relation to our two hundred million population.

And as for the retroactive effect given to the *Seven-Up* case in the case at bar, only a minute number of persons are affected. This ruling only applies to cases on the subject in which trials occurred before the *Seven-Up* decision in May, 1965, now nearly three years old, and which are still pending. It is apparent by this time very few of these remain. Except as to these, the issues on this point are moot from the standpoint of public interest.

Rule 19, Revised Rules of this Court, provides:

> "A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where they are *special and important* reasons therefor." (Emphasis supplied).

No "special and important" reasons appear. The Petition is merely "a last ditch effort" of Williams to preserve the judgment he obtained. Admittedly, this issue is important to him, as well as to the Railroad, but not to the public generally.

For this purpose, Williams seeks to divert the attention of this Court from urgent international and national issues, and questions of impelling public importance, to consider his judgment, reversed for a new trial, at which he may still prevail.

Therefore, we submit that the Petition fails to show grounds warranting the discretionary action of this Court in granting certiorari.

IV.

Were the Federal Questions Presented in the Petition Properly and Timely Raised in the Prior Proceedings Herein and, Should the Petition Be Denied for Failure to Comply with Revised Rule 23-1(f) of This Court?

Another fundamental prerequisite for the granting of certiorari from a State Court judgment is that the Federal question shall have been properly raised in the State Court proceedings.

As stated in *Stern and Gressman, Supreme Court Practice*, 90:

> "It is essential to the jurisdiction of the Supreme Court under *Section 1257* that a substantial federal question have been properly raised in the State Court proceedings."

Illustrative of this principle is *Charleston Federal Savings & Loan Association* v. *Alderson*, 324 U.S. 182, 65 S. Ct. 624 (1945), in which this Court said:

> "It is essential to our jurisdiction on appeal under *Section 237(a)* (now *Section 1257* that there be an explicit and timely insistence in the State Courts that a State statute as applied is repugnant to the Federal Constitution, treaties or laws."

Of course, the same rule applies in this connection in certiorari as on appeal. A number of decisions of this Court on such point are cited in support of the above quotation.

This Court has emphasized this principle in *Rule 23, Revised Rules of the Supreme Court of the United States*:

> "1. The petition for writ of certiorari shall contain in the order here indicated—* * *

(f) If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e.g., by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court; with such pertinent quotations of specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of the court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari."

Williams has not complied with this Rule in his Petition. The apparent reason is that he could not do so, because the Federal questions sought to be reviewed herein were not raised in the record by him at any stage in this litigation.

The only Federal question raised by Williams was in his Petition for Rehearing in the Florida Supreme Court (Appendix A to this Brief), which was denied without opinion. That question related to whether the Railroad should have sought review of an interlocutory order of the District Court on extraordinary motions filed by it. This was obviously a non-federal ground. The Florida Supreme Court could certainly determine as a matter of State law whether the order in question was interlocutory or final, and if interlocutory, to sustain the right of review from the final action of the District Court. It is to be noted that in its opinion the Supreme Court did not

consider this point of sufficient importance to comment upon it. (Appendix A to the Petition).

No other Federal question was raised of record by Williams, and none were mentioned in the opinion of the Florida Supreme Court herein.

In the certiorari petition, it is said that the Federal questions were raised in Williams' Brief in the Florida Supreme Court. Nothing in the record filed in this Court supports this "testimony".

Further, this Court has repeatedly held that the raising of Federal questions in briefs is not sufficient to comply with the requirement that such questions be properly raised in the State Court, in order to vest jurisdiction in this Court.

In *Zadig* v. *Baldwin*, 166 U.S. 485, 17 S. Ct. 639 (1897), this Court said, with citation of a number of opinions of this Court supporting this statement:

> "The contention that there was a federal question raised below finds its only support in the fact that there has been printed in the record, as filed in this Court, what purports to be an extract from the closing brief of counsel presented to the supreme court of the state, in which such a federal question is discussed; and it is asserted orally at bar that in the oral argument made in the supreme court of California a claim under the federal constitution was presented. But manifestly, the matters referred to form no part of the record, and are not adequate to create a federal question when no such question was necessarily decided below; and the record does not disclose that such issues were set up or claimed in any proper manner in the courts of the state."

In *Live Oak Water Users' Association* v. *Railroad Commission*, 269 U.S. 354, 46 S. Ct. 149 (1925), the above statement in *Zadig* was quoted and followed.

In *Lynch* v. *People of New York*, 293 U.S. 52, 55 S. Ct. 16 (1934), in holding that the record failed to show jurisdiction in this Court and dismissing the writ of certiorari, this Court said:

> "But jurisdiction cannot be founded upon surmise. Nor can claim of jurisdiction be sustained by reference to briefs and statements which are not a part of the record."

Therefore, in addition to the other grounds herein detailed, it is submitted that the failure of Williams to comply with *Rule 23-1(f)* of this Court and properly to raise the Federal questions asserted in his Petition is fatal. It is respectfully submitted that such Petition be denied.

CONCLUSION

Summarizing our argument, Williams is not entitled to a Writ of Certiorari herein because:

1. The judgment herein sought to be reviewed is not a final judgment, in that the cause was remanded for a new trial.

2. Said judgment is based upon adequate non-federal grounds.

3. The Petition does not present questions of public importance.

4. The Federal questions sought to be invoked herein were not properly and timely raised below; and Williams has not complied with Rule 23-1(f) on this point.

Accordingly, it is urged that the Petition for a Writ of Certiorari to the Supreme Court of Florida be denied.

Respectfully submitted,

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January, 1968.

APPENDIX A

IN THE SUPREME COURT OF FLORIDA

No. 35,718

SEABOARD AIR LINE RAILROAD COMPANY, a foreign corporation, authorized to do business in the State of Florida,
Petitioner,

vs.

WARREN G. WILLIAMS, JR.,
Respondent.

Petition for Rehearing

Respondent, WARREN G. WILLIAMS, JR., by his undersigned attorneys, respectfully petitions the Court for a rehearing on the petition for Writ of Certiorari and submits that the opinion of the Court filed May 24, 1967, quashing the decision of the District Court with directions that the cause be remanded to the Trial Court for a new trial, should be held for naught for the following reasons severally:

I.

The Court filed its opinion on May 24, 1967, without due consideration and deliberation given to the Respondent's brief filed with the Court and to the oral argument presented by counsel for the Respondent and failed to consider the matters and things set forth in said brief and authorities quoted therein.

II.

The Court overlooked Point I of the Respondent as set forth in his brief and made no reference whatsoever to said point in the opinion filed by this Court on May 24, 1967.

III.

In this Court's majority opinion sub judice it was stated, "it is obvious for all to see, that the rule of law applicable at the time of appellate decision will have applied to the two cases while a different erroneus rule will have been applied in a third". Such reasoning compounds error upon error, as say, two "rear-end" decisions decided one way requires that a third also be decided the same although the third was guilty of a gross violation of procedure and constitutional jurisdiction. Petitioner sought jurisdiction of this Court on the basis of grave and fundamental error not apparent or available to preserve at trial. Petitioner attempted to invoke jurisdiction of the Second District Court of Appeal on this identical basis in July, 1965, and said Court rightfully denied same by its order of July 7, 1965. If Petitioner were entitled to a further review by any stretch of imagination in this Court, it should have timely filed its petition for writ of certiorari, i.e., within sixty (60) days of July 7, 1965. This was not done and obviously now it is too late. The District Court being a Court of final determination by our constitution, Respondent's rights were vested at that time. *To further review this action by the Second District Court of Appeal is a denial of Respondent's rights as guaranteed by the due process and equal protection clauses of the United States Constitution* and Section 12, Declaration of Rights of the Florida Constitution. (Emphasis supplied).

IV

It was distinctly stated in Point I that the Petitioner while the case was in the Second District Court by motions attempted to have the Court permit it to amend its assignment of errors and its brief so as to bring forward the constitutionality of the comparative negligence stat-

ute based upon the fundamental error conception. The District Court refused to permit these amendments and by its order of July 7, 1965, denied said motions. Notwithstanding action of the Second District Court which was the Court of final determination on this question, the Petitioner proceeded to argue the case on its merits on appeal before the Fourth District Court and did not see fit to timely bring up by Certiorari to this Court the order overruling its petitions to amend. The Petitioner, by refusing to take the order of the Second District Court of Appeal in proper time to this Court by writ of certiorari, was estopped from again asserting this question before this Honorable Court. The Petitioner had had his day in Court and cannot again have a second day in Court or two swings at the ball, all of which is contrary to the Florida Appellate Rules which were promulgated by this Court.

V.

By the opinion followed by this Court on May 24, 1967, it is in effect placing in doubt the Constitutional Amendment, to-wit: Article V, Sec. 5(3), giving and granting to the District Courts of Appeal final jurisdiction to review cases from trial Courts of each appellate district, and thus holding Article V, Sec. 5(3), for naught.

VI.

The Court overlooked the jurisdiction and authority given to the District Courts of Appeal by Article V, Sec. 5(3) of the Constitution of the State of Florida and in effect thus granting to this Court the right to search the record of any appeal before it to see if error has been committed.

VII.

The Court failed properly to evaluate and give the effect of "per curiam affirmed". For aught this Court knows, "the per curiam opinion affirmed", the Fourth District Court of Appeal took into consideration the record as presented to it. No duty or authority is given this Court to go behind this per curiam affirmed, and search the record in effort to find some error, if any. If this Court has authority to act as set forth in its opinion of May 24, 1967, it is useless and of no benefit for the District Court of Appeal to exist.

VIII.

The Court failed by its opinion in this cause to give any weight or value to the opinions of the District Court of Appeal and in fact gave the Petitioner in this cause two swings at the ball, having been denied the right to bring forward the question of comparative negligence in the District Court of Appeal. This Court searched the record to find some reason so that the Petitioner may have two appeals, all of which is contrary to the Constitution of the State of Florida which has granted unto the District Court of Appeal to be a Court of final jurisdiction. This Court violated the authority given it by the Constitution when it attempted to clothe itself with the authority and privilege of exploring trial records in order to produce a conflict when the record discloses that no conflict exists.

IX.

The Court failed to evaluate this case in accordance with the power granted it by the Constitution of the State of Florida and by so doing held that the District Court of Appeal decisions are no longer final under any circum-

stances and throws appellate decisions into a turmoil and strife.

X.

This Court failed to stay within the bounds of the Constitution of the State of Florida, thus causing all litigants to be apprehensive of any decision of the District Court of Appeal and causing the litigant to never be satisfied until an attempt is made to have this Court review the decision of the District Court of Appeal in all instances.

Respondent respectfully prays that this Court enter its order granting this Petition for Rehearing.

Respectfully submitted,

Jos. D. Farish, Jr.
Of Counsel

Farish & Farish
Denco Building
316 First Street
West Palm Beach, Florida
Attorneys for Respondent

APPENDIX B

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING PETITION AND, IF FILED, DETERMINED.

IN THE SUPREME COURT OF FLORIDA

JULY TERM, A. D. 1966

FLORIDA EAST COAST RAILWAY COMPANY, a Florida corporation,
Petitioner,
vs.
RUBY ROUSE,
Respondent.

Case No. 34,815

Opinion filed January 9, 1967.

Writ of Certiorari to the District Court of Appeal, Third District.

Bolles, Goodwin & Ryskamp, for Petitioner.

Nichols, Gaither, Beckham, Colson & Spence and Horton & Schwartz, for Respondent.

On Petition for Rehearing Granted

CALDWELL, J.

Showing conflict jurisdiction, the petitioner for writ of certiorari seeks review of the decision of the District Court of Appeal, Third District, reported at 178 So. 2d 882, affirming a jury verdict and judgment of Sixteen thousand three hundred thirty-three dollars ($16,333.00) for respondent Ruby Rouse, plaintiff in the trial court, against the petitioner-defendant, Florida East Coast Railway Company. The respondent, while walking on the railway tracks, was injured by petitioner's train.

At the trial both parties requested instructions under the railroad comparative negligence statute[1] and the instruction requested by petitioner was given. On appeal, the petitioner assigned as error the trial court's refusal to grant its motion for directed verdict.

After entry of final judgment for the plaintiff, but prior to the date set for argument on appeal in the District Court, this Court rendered its decision in Georgia Southern and Florida Railroad Company v. Seven-Up Bottling Company, 176 So. 2d 39, holding Florida Statute §768.06, the railroad comparative negligence statute, unconstitutional. In other words, the cause sub judice was tried under the law of Florida as it was prior to the decision last above cited and the appeal in the District Court was considered after that decision was rendered.

The District Court of Appeal held the instruction on comparative negligence, given pursuant to the pertinent statute (subsequently held invalid) did not constitute fundamental error which could be raised for the first time on appeal.

Although not applied because the appellate court thought the point, not raised at the trial level, could not be considered on appeal, the District Court correctly stated the controlling rule of law in this language:

> "We recognize the general and Florida rule to be that an appellate court, in reviewing a judgment on direct appeal, will dispose of the case according to the law prevailing at the time of the appellate disposition, and not according to the law prevailing at the time of rendition of the judgment appealed."

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1. F.S. §763.06.

A change in the state of the law, intervening between trial and appeal, seldom occurs and is usually not foreseeable. The change in this cause was not foreseeable, the comparative negligence statute having been held valid in 1942.[2] Nevertheless, and notwithstanding the failure of the parties, at the trial level, to attack the validity of the statute, the appellate court was required to apply the law as it existed at the time of appeal.

A somewhat similar situation[3] arose in 1934, and this court held:

> "In order that the present case may be reconsidered in the court below in the light of the rule of law stated in the above-mentioned cases decided here subsequent to the entry of the present appeal in this case, it is ordered that the decree appealed from be reversed without prejudice, and that this cause be remanded to the circuit court for further proceedings therein, with leave to each of the parties to make such amendments to the pleadings and to offer such additional evidence as the Chancellor may allow in order to have the controversy properly re-presented to the court for reconsideration in the light of applicable provisions of law. . . ."

In a cause[4] involving a statutory change between the trial and appeal it was held:

> "It is apparent that Section 687.07, Florida Statutes, 1963, F.S.A., was the basis of the proceedings below. However, subsequent to the entry of the final decree and the filing of the notice of appeal, Chapter 650299, Laws of Florida 1965, was enacted, the provisions of which may have some effect on Section

2. Loftin v. Crowley's, Inc., 150 Fla. 836, 8 So. 2d 909 (1942).

3. Winter Park Golf Estates v. City of Winter Park, 114 Fla. 350, 153 So. 842 (1934).

4. General Capital Corporation v. Tel Service Co., 183 So. 2d 1 (Fla. 1966).

687.07. The appellant has filed a motion here for application of the intervening legislation, and the appellee has filed a suggestion of the unconstitutionality of intervening legislation, plus a motion for an order suspending appellate proceedings, and remanded the cause to the trial court for consideration of its suggestion of unconstitutionality. Since we have a law of the state of Florida which intervenes subsequent to the law on which this case was originally decided, we temporarily relinquish jurisdiction over this case and remand it to the lower court for reconsideration and redetermination of the issues that may arise in view of the 1965 Act. * * *"

In this cause, between trial judgment and appeal, there was a change in law which affected the result and, in consequence, certiorari must be granted, the decision under review quashed without prejudice and the cause remanded with directions to remand for a new trial.

It is so ordered.

THORNAL, C.J., THOMAS, ROBERTS and O'CONNELL, JJ., concur.

DREW, J., dissents with Opinion.

ERVIN, J., dissents and concurs with DREW, J.

DREW, J., dissenting:

On rehearing I would adhere to the order discharging the writ issued in this cause.

There appears to be no genuine dispute on the point of applicability of current decisional law to the disposition of all issues properly presented on an appeal.[1] On the record in this case, however, the district court concluded that the appellant could not present initially on

1. Winter Park Golf Estates v. City of Winter Park, 114 Fla. 350, 153 So. 842 (1934).

appeal an issue inconsistent with the theory on which it defended the suit and requested instructions to the jury in the trial court, and wholly beyond the scope of the appeal controverting the judgment only on the ground that a verdict should have been directed.

The decision further was that the error, if any, was invited error and the requested instructions, stating the statutory exclusion of the defense of contributory negligence which was not raised by the pleadings in any event, did not constitute fundamental error requiring reversal of the judgment of a trial court before which the issue was not raised. This decision does not, in my opinion, conflict with the decisions[2] cited by petitioner holding that questions of statutory validity in other factual situations amount to fundamental error which may be urged at any time.

I think it is apparent from an examination of the alleged conflicting decisions, in conjunction with the mass of related rulings in this area,[3] that the cases in question held only that the constitutional issues there presented involved fundamental error, and not that constitutional issues, generally, amount to fundamental error cognizable initially on appeal. The latter contention is clearly irreconcilable with the elemental rule of judicial procedure requiring that constitutional issues be eschewed unless timely raised and essential to the disposition of a cause.[4]

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2. Parker v. Town of Callahan, 115 Fla. 266, 156 So. 334; Town of Monticello v. Finlayson, 156 Fla. 568, 23 So. 2d 843.

3. Ellis v. State, 74 Fla. 215, 76 So. 698; Carlton v. Fidelity and Deposit Co., 113 Fla. 63, 154 So. 317; Evans v. Hillsborough County, 135 Fla. 471, 186 So. 193; Mills v. Mills, 153 Fla. 746, 15 So. 2d 763; Henderson v. Antonacci, Fla. 1952, 62 So. 2d 5; Greene v. Alexander Film Co., Fla. 1953, 65 So. 2d 53; State v. McInnes, Fla. App. 1961, 133 So. 2d 581; Gleason v. Dade County, Fla. App. 1965, 174 So. 2d 466; cf. 6 Fla. Jur., Constitutional Law, §50, p. 310, n. 14.

4. Greene v. Alexander Film Co., (1953 Fla.) 65 So. 2d 53; 1 Fla. L. Rev. 460.

Neither does such a contention comport with the decisional definition of fundamental error in civil cases as relating to the existence of the cause of action, right to recover, or jurisdiction of the trial court,[5] non-waivable in this and other contexts.

Although the point is not essential to my conclusion on the petition in this case, it seems to me that the decision of this Court in Georgia Southern & Fla. R. Co. v. Seven-Up Bottling Co., Fla. 1965, 175 So. 2d 39, was only to the effect that factual conditions had at the time of that decision rendered Section 768.06, F.S., unconstitutional. Whatever might be the implications with respect to contemporaneous litigation involving the statute, the decision certainly did not purport to adjudicate its validity at any earlier time, as is the case when constitutionality turns upon issues necessarily invalidating a law ab initio. Nor did the court in that case conclude that any earlier adjudication of constitutionality of the statute was in error on the facts then presented. Some distinction must of course be made between retroactive application of case law as opposed to legislative enactments,[6] since the controlling effect of a judicial decision beyond the specific parties involved depends in our system of jurisprudence upon the principles of stare decisis rather than any pronouncement of the court.

I would, for the reasons hereinabove stated, adhere to the order of discharge.

ERVIN, J., concurs.

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5. Townsend v. Beck, 140 Fla. 553, 192 So. 390. Cf. Schaff v. Lynn, Tex. Civ. App. 1923, 253 S. W. 590, 591.

6. General Capital Corporation v. Tel Service Co., 183 So. 2d 1 (Fla. 1966).

APPENDIX C

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM, A. D. 1967
FRIDAY, JUNE 30, 1967

SEABOARD AIR LINE RAILROAD COMPANY, a foreign corporation, authorized to do business in the State of Florida,
Petitioner,
vs.
WARREN G. WILLIAMS, JR.,
Respondent.

Case No. 35,718

The order of this court dated Wednesday, June 28, 1967, denying petition for rehearing is vacated and the following order is substituted in lieu thereof:

Upon consideration of petition for rehearing filed by respondent,

IT IS ORDERED that the petition be and the same is hereby denied.

A True Copy
TEST:
/s/ Sid J. White
Sid J. White
Clerk, Supreme Court

CC: Messrs. Farish & Farish
Messrs. Caldwell, Pacetti & Barrow
Hon. Chas. S. Ausley
Hon. Julia Maddox
Hon. John B. Dunkle